Kane County Commission

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August 4, 2009

Secretary Ken Salazar
Department of the Interior
1849 C Street N.W.
Washington D.C. 20240

Re: Department of the Interior Policy Regarding Revised Statute 2477 Rights-of-Way

Dear Secretary Salazar:

The Kane County Commission is concerned about your change in policy regarding Revised Statute 2477 rights-of-way as stated by BLM Acting Director Ron Wenker in a memorandum dated February 20, 2009. The memorandum (which issued at your direction) effectively revokes the Norton Policy that was carefully developed to implement the holding in *SUWA v. BLM*, 425 F.3d 735 (10th Cir. 2005). As stated in the Wenker memorandum, the BLM may only process and authorize state and county roads through FLPMA Title V permits. This new policy runs directly contrary to the express holding in *SUWA v. BLM* that "R.S. 2477 creates no executive role for the BLM to play." *Id*. at 754. Interior's concerted effort to make states and counties exchange their R.S. 2477 rights-of-way for FLPMA Title V permits is both improper and unappealing. It is improper for Interior to attempt to take back rights-of-way granted by Congress, and unappealing for local governments to swap real property interests for permits that Interior can revoke or modify at will. Kane County has direct experience with Interior's willingness to later modify the terms of a FLPMA Title V permit. Kane County acquired a FLPMA Title V right-of-way for its paved Johnson Canyon road in the 1980's, part of which crosses the Grand Staircase-Escalante National Monument. In 1999 through its management plan, Interior unilaterally modified and restricted Kane County's ability to manage its Johnson Canyon road, notwithstanding the county's objections. Given that Interior is not bound to honor FLPMA Title V rights-of-way, they are not an attractive option.

The Commission is concerned that you have now created a policy worse than the failed Babbitt Policy of January 22, 1997. The Babbitt Policy attempted to redefine R.S. 2477 rights-of-way out of existence and directly caused numerous lawsuits across the west, including the lawsuit ultimately resolved by the Tenth Circuit in *SUWA v. BLM*.

The *SUWA v. BLM* decision confirmed that Interior may administratively determine the existence of R.S. 2477 rights-of-way for its internal planning purposes. The Norton Policy, though ineffective due to lack of agency support, offered western states and counties an opportunity to resolve their road needs without litigation. Even though Interior failed to complete even one single administrative determination under the Norton Policy, it could have worked. Kane County diligently pursued several administrative determinations over the last four years and has tried to make this process work. Your new direction, expressed in the Wenker memorandum, guarantees that Interior and the affected states and counties will end up in avoidable and costly litigation.

The primary purpose of this letter is to confirm your understanding of the serious problems Interior's policies have created in Kane County, and to ensure that Interior recognizes the consequences of its actions. As discussed below, Interior is currently responsible for roads crossing public lands in Kane County, and must act now to restore them to safe traveling condition. Until further legal development, or, of course, acknowledgement that a specific road crosses a Kane County right-of-way, Interior is responsible and liable for all aspects of highway management on public lands in Kane County.

Kane County's transportation system roads have existed for over 50 years—some of them are over 100 years old and pre-date Utah's statehood. Kane County historically maintained these roads using State of Utah and Kane County funds. Where they cross federal land, the only legal authority for Kane County's ownership and maintenance of these roads is the congressional grant of public highway rights-of-way in R.S. 2477. Until the mid-1990's, Kane County's ownership, management and maintenance of these roads was not questioned, and the county and Interior cooperated to promote the public interest served by the roads. There were no federal travel management plans affecting the roads, and Kane County and Interior coordinated road maintenance through a cooperative road maintenance agreement.

Commencing in 1995, Interior unilaterally changed its policy regarding R.S. 2477. No statutory or regulatory action authorized or caused this change, it was purely a policy shift. Implementing the new policy, Interior summarily revoked Kane County's cooperative road maintenance agreement, and in 1996 sued Kane County for trespass when it maintained several of its roads. Interior lost this trespass suit as reported in *SUWA v. BLM*. Under the new policy, Interior decided that it would proceed to adopt and implement restrictive federal road management plans without <u>any</u> thought or consideration of Kane County's public transportation system rights, interests, or needs. First, Interior adopted the Monument travel plan in 1999, and proceeded over the years to adopt and implement restrictive road management plans for all of the remaining public lands in Kane County, most recently through the Kanab Field Office RMP in November of 2008.

These new federal travel plans, that now cover <u>all</u> of the public lands in Kane County, have one intentional omission: Interior refused to identify or acknowledge even one single road as being a Kane County road—not even the Skutumpah road which Interior determined to cross a Kane County R.S. 2477 right-of-way. *See SUWA v. BLM*, at 743-44, 788. Furthering Interior's policy of refusing to acknowledge any R.S. 2477 road, Interior's Utah solicitor informed Kane County that the Tenth Circuit did not understand the issues when it affirmed the Skutumpah road determination, and that it is not binding upon Interior.

Because Interior refused to acknowledge even one single road crossing federal land as being a Kane County road, several conservation groups sued Kane County and obtained a decision from the Utah District Court holding that Kane County does not have any R.S. 2477 public highway rights-of-way until adjudicated in court. *See TWS v. Kane County*, 560 F. Supp. 2d 1147 (D. Utah 2008), appeal pending as 08-4090. Had Interior addressed Kane County's R.S. 2477 rights-of-way during its planning, this suit would have never occurred.

Interior chose to regulate public highways on federal land and to refuse to acknowledge or consider Kane County's public highway rights, interests or needs. Interior chose to claim the roads as its own, and Interior's attorneys have repeatedly argued in court that all roads crossing federal lands are presumptively federal roads. In light of Interior's actions, claims, and the *TWS* decision, Kane County informed the BLM state and local representatives in June of 2008 that until further legal developments, or Interior's recognition of any particular road as crossing a Kane County right-of-way, public highways on federal lands would be, as Interior claims, presumptively a federal responsibility.

Over the last year, Interior has failed to take responsibility for its actions. The BLM has failed to maintain roads on federal lands despite its knowledge of serious public safety hazards caused by the weather and lack of maintenance. BLM refused to clear snow off the roads this last winter, and failed to obtain the traffic regulation signs necessary to safely regulate the roads—even though Kane County warned BLM that it would need to get its own signs and regulate the roads.

Recently, BLM accepted part of its responsibility for the roads. Kane County agreed to loan its traffic control signs to BLM on a temporary basis, and the BLM has been placing traffic control signs along some of the roads. While we appreciate this acceptance of responsibility, it is wholly insufficient. The most pressing public safety need is for the BLM to maintain the traveling surface of the roads. Some of the roads have dangerous headcuts along the traveling surface, and many others are washboarded and rutted to the point where there have been instances of vehicle damage. If Interior does not maintain the roads, there will inevitably be personal injury. Interior's half efforts, in assuming responsibility for traffic control signing, have not addressed the most serious public safety hazards on the roads.

Recently, Kane County requested BLM Utah State Director Selma Sierra to meet with the Kane County Commission to try to resolve the public safety problems caused by the lack of maintenance and proper regulation. The Commission even agreed to travel to Salt Lake City to hold the meeting as an accommodation to Director Sierra's schedule. Although Director Sierra had previously agreed to meet with the Commission in Salt Lake City on July 15, 2009, late on July 14 she informed the Commission that she would not attend the meeting. The Commission held the meeting in Salt Lake City as scheduled. State and Association of Counties representatives attended the meeting, but no one from Interior appeared.

It is unfortunate that Kane County has to write this letter to you directly, as these matters should be resolved at the state or local level. However, the Interior's state and local representatives have ignored their responsibilities and have taken to papering files with non-responsive letters, and even making the patently ridiculous argument that "maybe" Interior did not revoke Kane County's road maintenance agreement. These actions cause Kane County to believe that the seriousness of this situation has not been fairly brought to your attention.

Having been the Governor of a western state, you must know that R.S. 2477 rights-of-way are the foundation of a county's transportation system. The attached maps illustrate the devastating impact the loss of those rights-of-way has on Kane County's transportation system. Many of the roads caught up in the R.S. 2477 controversy are major highways that serve both a public and a federal need. Almost all of these major highways are well documented by federal, state, and local records as having been constructed under R.S. 2477 authority. There is little question that these major highways were established as valid existing rights to be protected under the provisions of FLPMA Under FLPMA you have the authority to resolve the public safety hazards and conflict for these major highways (that are both beneficial and non-controversial) through a Recordable Disclaimer of Interest process. We encourage you to consider that option in order to resolve this contentious public lands issue for the common good.

Some roads will undoubtedly be litigated because of legal or political disagreement, but it is both legally and politically reasonable to bring some level of resolution to the R.S. 2477 conflict through the administrative acknowledgement of the county's highway rights to manage the major highways that are not at controversy with anyone. Kane County will <u>immediately</u> resume maintenance, repair, and regulation of <u>any</u> road crossing federal land that Interior acknowledges to cross a Kane County right-of-way.

In the absence of a road specific acknowledgement, maintenance, regulation and liability for roads

crossing federal land are, for now, presumptively federal responsibilities. Interior cannot expect Kane County to pay to maintain federal roads, or to be liable for incidents on federal roads. Interior's actions, driven solely by policy and not the law, have caused this unfortunate situation. And yet Interior can solve these problems today.

Until further action regarding Kane County's ownership of highway rights-of-way crossing federal land are settled, we respectfully request you to direct the appropriate Interior representatives to comply with their duty to maintain and regulate the roads in the interest of public safety. Kane County further requests a meeting with an appropriate representative of Interior to facilitate a discussion and prioritization of the most pressing public safety needs.

The Commission respectfully urges this action for the common good and for the safety of the traveling public. If the Commission can be of any further assistance in this important matter, please do not hesitate to contact us.

Sincerely,

/s/ Daniel W. Hulet
Daniel W. Hulet
Commission Chair

/s/ Doug Heaton
Doug Heaton
Commissioner

/s/ Mark W. Habbeshaw
Mark W. Habbeshaw
Commissioner

Attachments: County letter to BLM dated July 8, 2009
County letter to BLM dated July 13, 2009
Citizen's Petition (unsigned)
Pre *TWS v. Kane* County road map
Post *TWS v. Kane* County road map

cc: BLM Director Mike Pool (Acting)
BLM State Director Selma Sierra
NPS Director Mary Bomar
NPS State Coordinator Cordell Roy
GCNRA Superintendent Stan Austin
Color Country District Manager Todd Christensen
Kanab FO Manager Harry Barber
GSENM Manager Rene Berkhoudt
Lt. Governor Gary Herbert
Utah Coordinator John Harja
UAC Director Brent Gardner
Senator Robert Bennett
Senator Orin Hatch
Congressman Jim Matheson
Congressman Rob Bishop
Congressman Jason Chaffetz